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No. 06-1606

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In The Supreme Court of the United States

STEPHEN AVILLA, and LEGAL AID SOCIETY OF SANTA CLARA COUNTY,

Petitioners,

v.

JAMES MCNAIR THOMPSON,

Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal for the Sixth District

REPLY BRIEF FOR PETITIONERS

JOHN MARSHALL COLLINS, P.C.
JOHN MARSHALL COLLINS
ATTORNEY AT LAW
50 West San Fernando Street, Suite 350
San Jose, California 95113
(408) 287-9001

Counsel for Petitioners

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTIONS PRESENTED FOR REVIEW

A non-governmental, non-profit legal aid corporation contracts with a County to appoint and compensate non-employee lawyers from a panel to represent indigent criminal defendants in cases where a conflict of interest requires separate counsel. The corporation is solely responsible for the review, approval/disapproval, and payment of billings submitted by its appointed attorneys, and operates independently of any state entity in regard thereto. The following question is presented:

> Is the legal aid corporation a "state actor," therefore subjecting it to suit for alleged violation of the lawyer's civil rights under 42 U.S.C. §1983, when it disapproves an appointed lawyer's bills and deals with a subsequent fee dispute with the lawyer over the disputed bills, because the legal aid corporation performs a traditionally exclusive state function in dealing with such matters?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
REPLY BRIEF FOR THE PETITIONERS	1
ARGUMENT	1
CONCLUSION	8

TABLE OF AUTHORITIES

Page

Cases

Brown v. Board of Education, 347 U.S. 483 (1954) 2

Gideon v. Wainwright, 372 U.S. 335 (1963) 2

Stenberg v. Carhart, 530 U.S. 914, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000) 2

Woman's Choice-East Side Women's Clinic v. Newman, 305 F.3d 684 (7th Cir. 2002) 2

Constitutional Provisions

U.S. CONST. AMEND. VI 2, 7

Other Authorities

American Heritage Dictionary, 4th ed. (2000) 6

Faigman, "A Unified Theory of Constitutional Facts," The Berkeley Electronic Press 2006, page 18 5

Strong, American Constitutional Law, Chapter 4, Judicial Competency for Constitutional Determination (1950) page 212 5

REPLY BRIEF FOR THE PETITIONERS

Petitioners Stephen Avilla and the Legal Aid Society of Santa Clara County respectfully file this Reply Brief to address new issues raised in Respondent's Brief in Opposition to the Petition for Writ of Certiorari.

ARGUMENT

The Court of Appeals' holding that "paying appointed counsel reasonable compensation . . . is now and has been . . ." a traditional public function since 1941 [App. 23a-24a], and that performance of this function is now "the exclusive prerogative of the state . . ." [App. 23a] is one of the key holdings as to which relief is being sought by certiorari in this Court[1].

Respondent's Brief in Opposition treats this finding as if it was the equivalent of a finding of negligence or criminal intent, i.e., as a finding of fact specific to this case. Based on this premise, Respondent argues that this is just a dispute over a lower court factual finding, therefore beneath the attention of the Supreme Court and a waste of its resources (Resp. Brief

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1. Respondent incorrectly argues that this is the entire issue presented for decision in the Petition. To the contrary, Petitioners submitted substantial argument in their Petition, at heading I, pages 12 to 19, to the effect that the trial court used a correct test – the amount and nature of the state's involvement in the decisions about Respondent's fee claims – in finding in Petitioners' favor on this issue, that the Court of Appeals erred by using an inappropriate test – the "traditional and exclusive function test" -- and that had the correct test been applied, Petitioners would have been entitled to judgment.

in Opposition, pages 6-8).

To the contrary, this Petition presents an issue of "constitutional fact" – involving the determination of underlying socio-legal facts[2], applicable in all similar cases, which will decide the application of the constitutional power to regulate "state action." As such, this Petition deserves the attention of the Court.

One of Respondent's sub-premises is that whether this is a "traditional and exclusive function" of the state is a question of state law, which carries with it the implicit premise that findings on this issue could vary from state to state. To the contrary, the finding made by the Court of Appeals had no state-law-specific dimension, but turned on the general right to appointed counsel under the Sixth Amendment to the U.S. Constitution and **Gideon v. Wainwright**, 372 U.S. 335 (1963). All states must honor such rights, and thus, this is not a state-by-state issue.

In **Woman's Choice-East Side Women's Clinic v. Newman**, 305 F.3d 684 (7th Cir. 2002), the Court held that a national scope was required to determine an issue that called for a constitutional determination: "[C]onstitutionality must be assessed at the level of legislative fact, rather than adjudicative fact determined by more than 650 district judges. Only treating the matter as one of legislative fact produces the nationally uniform approach that Stenberg [Stenberg v. Carhart,

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2. The most prominent finding of this nature is the determination that separate schools for members of minority races are inherently unequal. **Brown v. Board of Education**, 347 U.S. 483 (1954).

530 U.S. 914, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000)] demands." **Woman's Choice**, supra, at page 688. Similarly, the current matter requires a national resolution so that all actors may shape their conduct in light of a single, national standard

We submit that there are crucial differences between the adjudicative factual findings that are specific to an individual case and the kind of findings that have been made in the instant case, which require the Supreme Court to intervene.

As an example, the trial court held that the important question was the depth and breadth of state involvement in Petitioner Legal Aid's decision to withhold compensation from Respondent on the Mares defense. It found such involvement was nonexistent[3]. The question of the County's involvement in the decision, or even of its legal right to be involved in the decision, would be a question of "adjudicative fact," specific to this case. This determination would not affect or serve as a precedent in other cases involving other agencies with other legal, contractual, or factual relationships with the state.

On the other hand, the facts apparently found by

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3. The Court of Appeal decision conceded that there was substantial evidence to support the trial court's findings that Legal Aid was independent of the county; that the county had no contractual role in determining what to pay Respondent; and that the county had no involvement in Respondent's fee dispute with Legal Aid [App. 22a - 23a]. It is also notable that the Court of Appeals does not make reference to any trial court findings or any evidence offered by either party that was pertinent to the "traditional and exclusive state function" test.

the Court of Appeals – that providing payment to appointed indigent criminal defense counsel is and has been a traditionally exclusive state prerogative – are not "adjudicative" facts, specific to the dispute between Legal Aid and Respondent. Rather, they are "constitutional" facts which would apply to all similar cases.

The trial court made no finding on the "traditional and exclusive state function" test, because it did not find this test to be the applicable standard of decision. The Court of Appeals decided that the trial court used the wrong standard, not that it found the facts incorrectly. Having held that the trial court should have used a different standard, the Court of Appeals proceeded to find the underlying constitutional facts (that this function was traditional and exclusive) and then apply the standard it had found applicable.

We would suggest that the proper course of action upon determining that the trial court had used the wrong test, and made no findings of fact underlying a ruling on the correct test, was to send the case back to the trial court for further proceedings on that issue. At that point, the parties could have offered evidence on the subject and the record would be much clearer.

Assuming *arguendo* that it was proper for the Court of Appeals to find these facts as a matter of first impression, without any trial court evidentiary hearing, Petitioners submit that the Court of Appeals erred in the conclusion it reached about the "constitutional" facts. That is why this Petition ought to be granted and this case ought to be heard.

Constitutional facts involve factual determinations that transcend particular cases and are relevant to the formation of a constitutional rule or the application of a rule to similarly occurring cases. Adjudicative facts, in contrast, refer to factual determinations that are relevant to the application of constitutional rules in particular cases. See, Professor David L. Faigman "A Unified Theory of Constitutional Facts," The Berkeley Electronic Press 2006, page 18.

The issue of "state action" is obviously a constitutional issue. The dozens of cases cited by both sides on the "state action" issue conclusively refute the contention that this is an issue too trivial or too case-specific to consume the attention of this Court.

Professor Frank R. Strong, the author of American Constitutional Law, 1950, Chapter 4, Judicial Competency for Constitutional Determination, summarized the methods of constitutional fact finding as (1) "presentation at the judicial trial level through historic evidential procedures"; (2) "development of facts at the administrative level"; (3) "the presentation of factual data via briefs at the trial and/or appellate levels"; and (4) judicial notice. American Constitutional Law, supra, page 212.

The Court of Appeals did not apparently use any of these methods to find the constitutional facts which formed the basis for its ruling. It simply stated that this function was "traditional" enough, having been in place since the middle of the twentieth century, and then assumed the "exclusivity" portion of the test.

The Court of Appeals cited no precedent on this

latter issue [App. 23a] and simply said that the Sixth Amendment and California state law "impose exclusive duties on the state to appoint and pay for counsel." It gave no consideration to the actual exclusivity of such matters, which is clearly lacking.

An "exclusive" prerogative is one which only the state can perform, yet the Court of Appeals admitted [App. 23a] that there are organizations and attorneys who have long provided free services for indigent criminal defendants. Unless the lawyers for these organizations are working for them for free, the organizations are appointing and paying counsel to provide defense services to otherwise unrepresented indigent defendants. If the state's power to do so was "exclusive," then these organizations would be infringing on the state's prerogatives. That such organizations continue to fulfill this function shows that it is not exclusively a state function.

One way to look at an "exclusive prerogative" is to see whether the state can prevent others from performing it. How can a "prerogative" be "exclusive" if the state cannot assert its exclusivity by preventing others from performing the function? Yet in this case, it is clear that others do perform the same function, with the knowledge and encouragement of the state. In fact, it is clear that a state would have no power to prevent appropriate agencies from providing and paying lawyers for indigent criminal defendants.

The American Heritage Dictionary, 4th ed. (2000) defines "exclusive" as ". . . Not allowing something else; incompatible; 3. Not divided or shared with others; . . ." It defines "prerogative" as ". . . an exclusive right or

privilege held by a person or group; . . the exclusive right and power to command, decide, rule, or judge . . ."

Putting these together, an "exclusive prerogative" is a right, power, or privilege which is not possessed by others; rather, it is a single and sole right incompatible with exercise by others.

When the Court of Appeals assumed that this was an exclusive prerogative, it did so without substantial analysis and without referencing any of the types of sources discussed by the above commentators. There was no lower court evidentiary fact finding process, no factual or evidentiary support offered by way of the briefs, and no explicit reference to judicial notice. The Court of Appeals simply issued its fiat that the function in question is a traditional and exclusive prerogative of the state.

As argued in the initial Petition, the payment of appointed counsel is not a function that, when performed by independent contractors outside the control of the state, should be deemed to be "state action," and is not the traditional and exclusive prerogative of the state. The Court of Appeals erred in finding this Constitutional fact, and therefore, Petitioners ought to be entitled to a hearing before this Court and a reversal on this issue.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Dated: September 5, 2007

Respectfully submitted,

John Marshall Collins, P.C.
John Marshall Collins
Attorney at Law
50 W. San Fernando St.
Suite 350
San Jose, California 95113
(408) 287-9001

Counsel for Petitioners